Supreme Court, U.S.
FILED
JUL 21 1997
CLERK

No. 96-1968

In the Supreme Court of the United States

OCTOBER TERM, 1996

MORTIMER L. GRANT, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's appeal was properly dismissed because he failed to pay sanctions imposed in a prior appeal.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1) and the opinion of the Tax Court are unreported.[1]

[1] The petition incorrectly lists the United States as the respondent in this case. The case was originally filed in Tax Court and the correct caption (which is shown on the opinion of the court of appeals, see Pet. App. A1) is "Mortimer L. Grant v. Commissioner of Internal Revenue." See Rule 60(b) of the Tax Court Rules of Practice and Procedure.

The opinion of the Tax Court was not reproduced in the appendix to the petition. It has since been provided separately by petitioner, however, and is cited in this brief as "Tax Ct. Op."

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1997. The petition for a writ of certiorari was filed on June 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner failed to file income tax returns for the tax years 1976 through 1978. On January 24, 1996, the Commissioner of Internal Revenue issued a notice of deficiency to petitioner determining a deficiency in federal income taxes for the taxable years 1976, 1977 and 1978 in the total amount of $151,726, and determining that petitioner was liable for additions to tax for failure to file tax returns (26 U.S.C. 6651(a)(1)) and for failure to pay estimated taxes (26 U.S.C. 6654).

Petitioner sought review of the Commissioner's determinations in the Tax Court. Petitioner asserted that the Internal Revenue Service was "without regulatory authority," that he did not sign a waiver authorizing the IRS to send him a notice of deficiency and that the deficiency determined by the Commissioner was arbitrary and capricious. The Commissioner moved to dismiss the case—and also sought to have a penalty imposed against petitioner under 26 U.S.C. 6673—on the grounds that the claims of petitioner were frivolous and were asserted for purposes of delay (Tax Ct. Op. at 1).[2]

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[2] 26 U.S.C. 6673(a)(1) authorizes the Tax Court to "require the taxpayer to pay the United States a penalty not in excess of $25,000" when the taxpayer has commenced proceedings "primarily for delay" or has asserted a position that is "frivolous or groundless" (*ibid.*).

The Tax Court agreed with the Commissioner that petitioner was advancing "tax protestor" arguments of the type routinely rejected by the courts and for which penalties have been imposed under 26 U.S.C. 6673. Instead of entering an award of sanctions at that time, however, the Tax Court gave petitioner six weeks either to object to the award of a penalty under 26 U.S.C. 6673 or to file an amended petition that alleged specific, non-frivolous grounds for contesting the deficiency asserted by the Commissioner. In response to that order, however, petitioner merely filed a motion for summary judgment that reasserted the contention that the deficiency determination was arbitrary and capricious. Petitioner presented no facts in support of his allegations and made no attempt to cure the defects in the petition (Tax Ct. Op. at 2).

The Tax Court dismissed the petition because it "present[ed] no assignments of error nor allegations of fact in support of any justiciable claim" and "raise[d] only tax protestor rhetoric and legalistic gibberish" (Tax Ct. Op. at 3). The court also imposed a penalty against petitioner under 26 U.S.C. 6673 in the amount of $5,000. The court stated that it was "convinced that petitioner instituted and maintain[ed] this proceeding primarily, if not exclusively, for * * * delay" (Tax Ct. Op. at 3).

2. Petitioner and his wife, Alice M. Grant, had previously appealed an order of the United States District Court for the Central District of California that enforced two IRS summonses. In that appeal, petitioner and Mrs. Grant argued that they were not subject to federal income tax because they were citizens of California. In an unpublished opinion, the Ninth Circuit affirmed the order enforcing the sum-

monses and awarded the United States $1,500 as a sanction for the frivolous appeal. *United States* v. *Grant*, No. 91-56344 (Feb. 10, 1993).

3. The monetary sanction imposed by the Ninth Circuit in that prior case had not been paid by petitioner by the time that he commenced the appeal in the present case. The Commissioner moved to dismiss the present appeal because of the petitioner's failure to pay the sanctions previously imposed by the court of appeals. Petitioner filed a response to that motion but did not pay the outstanding award of sanctions (Pet. 4).

The court of appeals dismissed the appeal "because of [petitioner's] failure to pay sanctions imposed against him by this court in *United States* v. *Grant*, No. 91-56344" (Pet. App. A1).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Under Rule 38 of the Federal Rules of Appellate Procedure, a court is authorized to award "just damages and single or double costs to the appellee" when it determines that an appeal is frivolous. Such sanctions serve "as a deterrent to the bringing of future frivolous appeals" and also compensate the government "for at least the direct costs of defending the appeal." *Stelly* v. *Commissioner*, 804 F.2d 868, 871 (5th Cir. 1986), cert. denied, 480 U.S. 907 (1987). See also *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 46 (1991) (sanctions vindicate judicial authority and compensate the prevailing party for expenses caused by the abuse).

This Court has emphasized that "[c]ourts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities." *Degen* v. *United States*, 116 S. Ct. 1777, 1780 (1996), citing *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43-46 (1991); *Link* v. *Wabash R.R.*, 370 U.S. 626, 630-631 (1962); *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). To protect the integrity of the judicial process and to compensate litigants for prior abuses of that process, courts have consistently concluded that a party should not be permitted to litigate in a court if sanctions or costs incurred in an earlier proceeding, or in prior actions involving the same parties and the same or similar subject matter, remain unpaid. *Hymes* v. *United States*, 993 F.2d 701 (9th Cir. 1993); *Christensen* v. *Ward*, 916 F.2d 1485, 1486 (10th Cir.), cert. denied, 498 U.S. 999 (1990); *Stelly* v. *Commissioner*, 804 F.2d at 871-872; *Zerman* v. *Jacobs*, 814 F.2d 107, 109 (2d Cir. 1987); *Schiff* v. *Simon & Schuster, Inc.*, 766 F.2d 61, 62 (2d Cir. 1985). See also Fed. R. Civ. P. 41(d). In some cases, courts have used their inherent power to stay or dismiss a suit because of a party's failure to pay costs assessed in a prior action. See, *e.g.*, *Falcon* v. *General Telephone Co. of Southwest*, 611 F. Supp. 707, 723-725 (N.D. Tex. 1985), aff'd on other grounds, 815 F.2d 317 (5th Cir. 1987); *Hymes* v. *United States*, 993 F.2d at 702; *Schiff* v. *Simon & Schuster, Inc.*, 766 F.2d at 62-63; *Weidenfeld* v. *Pacific Improvement Co.*, 101 F.2d 699, 700 (2d Cir. 1939); *Hilgeford* v. *Peoples Bank*, 110 F.R.D. 700 (N.D. Ind. 1986). In other cases, courts have directed their clerks not to accept any new filings by a party until sanctions imposed in prior proceedings are paid.

See, *e.g.*, *Christensen* v. *Ward*, 916 F.2d at 1485; *Stelly* v. *Commissioner*, 804 F.2d at 871; *Hymes* v. *United States*, 993 F.2d at 702; *Zerman* v. *Jacobs*, 814 F.2d at 109; *Hacopian* v. *United States Department of Labor*, 709 F.2d 1295, 1296 (9th Cir. 1983).

The fact that courts have responded somewhat differently to similarly abusive conduct (compare *Hymes* v. *United States*, 993 F.2d at 702 (dismissing for the nonpayment of costs of a prior action) with *Christensen* v. *Ward*, 916 F.2d at 1485 (directing the clerk not to accept any new filings)) indicates nothing more than the substantial breadth of "the permissible range of the court's discretion." See *Link* v. *Wabash R.R.*, 370 U.S. at 633. It does not, as petitioner erroneously contends (Pet. 8-10), reflect a conflict among the circuits on the scope of that discretion.

2. It is obvious why courts have decided not to hear appeals while previously imposed sanctions remain unpaid. In *Stelly* v. *Commissioner*, 804 F.2d at 871-872, the Fifth Circuit explained that it was "determined to stop the growing number of patently frivolous appeals filed by abusers of the tax system whose sole purposes are to delay and harass the collection of public revenues." The Ninth Circuit similarly stated in *Hymes* v. *United States*, 993 F.2d at 701-702, that "[w]e make clear today that we will not entertain appeals from a litigant who refuses to comply with a previous order of this court." As the Second Circuit noted in *Schiff* v. *Simon & Schuster, Inc.*, 766 F.2d at 62, to "make the sanction effective and thereby protect the processes of a court from abuse, a litigant against whom Rule 38 sanctions have been imposed

must comply with those sanctions before being permitted to pursue new matters in that court."[3]

By bringing this appeal while the sanctions imposed against him in *United States* v. *Grant*, *supra*, remained unpaid, petitioner defied the court's effort to stem his persistent abuse of the judicial process. By exercising its inherent power to dismiss the appeal in these circumstances, the court acted well within the scope of its permissible discretion. See *Link* v. *Wabash R.R.*, 370 U.S. at 633 (dismissal was not an abuse of discretion); *Chambers* v. *NASCO, Inc.*, 501 U.S. at 50 (sanctions reviewed for abuse of discretion). Because of petitioner's intransigent refusal to pay the sanction entered upon his prior frivolous appeal, dismissal of the appeal was an appropriate remedy in this case.

3. Petitioner errs in contending (Pet. 9-13) that he was not provided adequate notice and a hearing before the appeal was dismissed. The Commissioner's motion to dismiss obviously provided notice to petitioner of the possibility that the appeal would be dismissed. Petitioner was given an opportunity to oppose that motion and did so, filing a brief in which he argued

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[3] This Court has similarly instructed the Clerk of the Court not to accept further petitions from a litigious, indigent petitioner in noncriminal matters unless the petitioner first complies with the Court's Rules and pays required docketing fees. *Vey* v. *Clinton*, 117 S. Ct. 1792 (1997). To protect the orderly administration of justice and to prevent abuse of the Court's process, the Court has imposed prospective bars against filings in appropriate cases. See, *e.g.*, *Demos* v. *Storrie*, 507 U.S. 290 (1993); *Martin* v. *District of Columbia Court of Appeals*, 506 U.S. 1 (1992); *In re Sindram*, 498 U.S. 177 (1991); *In re McDonald*, 489 U.S. 180 (1989).

"that he was entitled to appeal as a matter of right" (Pet. 4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1997